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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NAPOLEON EBARLE, JEANNE  
STAMM, BRIAN LITTON, and REINER  
JEROME EBARLE on behalf of  
themselves and all other similarly situated,

Plaintiffs,

v.

LIFELOCK, INC.,

Defendant.

Case No. 3:15-cv-00258

**PLAINTIFFS' NOTICE OF MOTION;  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT; AND MEMORANDUM  
OF POINTS AND AUTHORITIES**

Date: December 17, 2015

Time: 2:00 p.m.

Courtroom: 15, 18th Floor

Judge: Hon. Haywood S. Gilliam, Jr.

**NOTICE OF MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

**PLEASE TAKE NOTICE** that on December 17, 2015, at 2:00 p.m., in the Courtroom of the Honorable Haywood S. Gilliam, Jr., United States District Judge for the Northern District of California, 450 Golden Gate Avenue, 18th Floor, Courtroom 15, San Francisco, California 94102, Plaintiffs Napoleon Ebarle, Jeanne Stamm, Brian Litton, and Reiner Jerome Ebarle (“Plaintiffs”), will and hereby do move the Court, pursuant to Federal Rule of Civil Procedure 23, for an Order:

- a) Granting Plaintiffs leave to file a Second Amended Class Action Complaint;<sup>1</sup>
- b) Granting preliminary approval of the proposed Class Action Settlement Agreement (“Settlement”) entered into between the parties;<sup>2</sup>
- c) Provisionally certifying the Class and Subclass as defined in the Settlement;
- d) Appointing Plaintiffs Napoleon Ebarle, Jeanne Stamm, Brian Litton, and Reiner Jerome Ebarle as Class Representatives of the proposed Class;
- e) Appointing Hank Bates and Randall K. Pulliam of Carney Bates & Pulliam PLLC and Michael W. Sobol of Lieff Cabraser Heimann & Bernstein LLP as Class Counsel for the proposed Class;
- f) Approving the parties’ proposed notice program, including the proposed forms of notice set forth in the Settlement, and directing that notice be disseminated pursuant to such program;
- g) Appointing Garden City Group, LLC (“Garden City Group”) as Settlement Administrator, and directing Garden City Group to carry out the duties and responsibilities of the Settlement Administrator specified in the Settlement;
- h) Staying all non-Settlement related proceedings in the above-captioned case (the “Action”) pending final approval of the Settlement; and
- i) Setting a Fairness Hearing and certain other dates in connection with the final approval of the Settlement.

This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the Settlement, including all exhibits thereto, the accompanying Joint Declaration of Hank Bates and Michael W. Sobol (“Joint Decl.”), the Declaration of Justice (ret.) Howard B. Wiener (“Wiener Decl.”), the argument of counsel, all papers and records on file in this matter, and such other matters as the Court may consider.

<sup>1</sup> See Exhibit A to the Joint Declaration of Hank Bates and Michael W. Sobol at Exhibit 7.

<sup>2</sup> See Exhibit A to the Joint Declaration of Hank Bates and Michael W. Sobol.

1 Dated: November 4, 2015

Respectfully submitted,

2 By: /s/ Michael W. Sobol

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiffs and Defendant LifeLock, Inc. (“LifeLock” or the “Company” or “Defendant”) have reached a proposed settlement (the “Settlement”) in the above-captioned action (the “Action”). Pursuant to the terms of the Settlement, LifeLock has agreed to establish a \$68,000,000 non-reversionary settlement fund (the “Settlement Fund”) for the benefit of members of the proposed Class. The costs of administering the Settlement, as well as any attorneys’ fees and costs and Service Awards to the Class Representatives that may be awarded by the Court will be paid by LifeLock *on top of* the Settlement Fund. In other words, the Class will receive the entire \$68,000,000 that comprises the Settlement Fund. This represents an excellent recovery for the proposed Class and falls well within the “range of reasonableness” applicable at the preliminary approval stage.

The Settlement is the product of extensive arm’s-length negotiations between the parties and their experienced and informed counsel. The settlement negotiations spanned seven months and included two, full-day mediation sessions before a highly respected and skilled mediator, Justice Howard Wiener. Prior to reaching the Settlement, Class Counsel thoroughly researched both the law and the facts involved in this case, reviewed and analyzed over 10,000 pages of documents produced by LifeLock, and deposed key employees of LifeLock. Class Counsel therefore had a firm understanding of both the strengths and weaknesses of Plaintiffs’ allegations and Defendant’s potential defenses. Both prior to and during the negotiations, Class Counsel faced formidable opposition from LifeLock’s counsel who zealously defended their client’s position. Both sides were therefore well-represented by seasoned and informed counsel who vigorously pursued their respective client’s interests.

The Settlement provides for direct notice to the Class via email or mail, which will be supplemented by publication and website notices. The notices explain in plain language the terms of the Settlement, the amount of attorneys’ fees and expenses Class Counsel will be seeking, and Class Members’ rights, including the right to opt-out or to object to the Settlement and/or to Class Counsel’s fee request. The Settlement therefore accords the best notice practicable under the

1 circumstances and complies with due process.

2 In sum, the Settlement provides a significant benefit to the Class now, without the  
3 inherent risks of continued litigation, was only reached after months of discovery and  
4 negotiations, and enjoys the support of a neutral mediator who had an integral part in the  
5 settlement negotiations. Consequently, the Settlement satisfies the criteria for preliminary  
6 approval.

## 7 **II. OVERVIEW OF THE LITIGATION**

8 This Action was commenced on January 19, 2015, when Plaintiffs Napoleon Ebarle and  
9 Jeanne Stamm, on behalf of themselves and a putative class, filed a complaint (the “Complaint”)  
10 (ECF No. 1) against LifeLock, alleging that LifeLock’s advertisements regarding its identity theft  
11 protection services violated Arizona’s Consumer Fraud Act, Ariz. Rev. Stat. § 44-1522(A)  
12 (“ACFA”).

13 On March 6, 2015, LifeLock filed a Motion to Dismiss (ECF No. 24) the Complaint. In  
14 response, Plaintiffs filed an Amended Class Action Complaint (the “Amended Complaint”) (ECF  
15 No. 31), which added Brian Litton as a Plaintiff and expanded upon the allegations and causes of  
16 action in the original Complaint. In their Amended Complaint, Plaintiffs allege that LifeLock  
17 made numerous misrepresentations to them and all Class Members that generally fall into the  
18 following four categories: (1) LifeLock’s promise to provide “comprehensive” services in  
19 detecting fraud; (2) LifeLock’s promise to provide timely and continuous alerts of potential fraud  
20 twenty four hours a day, seven days a week, three hundred sixty five days a year; (3) LifeLock’s  
21 promise to keep customers’ sensitive personal data—including credit card, social security, and/or  
22 bank account numbers which all Class members were required to and did provide to LifeLock—  
23 secure; and (4) LifeLock’s promise to provide a “\$1 Million Total Service Guarantee,” which, as  
24 the promise suggests purports to provide insurance in an amount up to \$1,000,000 against identity  
25 theft. Plaintiffs’ Amended Complaint seeks declaratory judgment, compensatory damages,  
26 equitable relief, attorneys’ fees, and costs.

27 In an effort to facilitate discussions regarding potential mediation and to maximize the  
28 efficient use of judicial resources, on April 9, 2015, the parties filed a Joint Stipulation Regarding



1 Amended Complaint (ECF No. 34), requesting the Court to extend LifeLock's time to answer  
2 Plaintiffs' Amended Complaint, which the Court granted (ECF No. 35). Thereafter, on April 22,  
3 2015, the parties participated in an in-person meeting regarding a possible mediation and  
4 exchanging informal discovery prior to any such mediation. Accordingly, on April 24, 2015, the  
5 parties filed a second Joint Stipulation Regarding Amended Complaint (ECF No. 37), which the  
6 Court granted on May 4, 2015 (ECF No. 38), giving Defendant until May 27, 2015 to answer or  
7 otherwise respond to Plaintiffs' Amended Complaint.

8 On May 13, 2015, the parties filed a third Joint Stipulation Regarding Amended  
9 Complaint (ECF No. 39), informing the Court that the parties had agreed to proceed with  
10 mediation on July 1, 2015 and advising the Court that the parties would provide a status update  
11 thereafter. On May 22, 2015, the Court granted the parties' Joint Stipulation, staying the matter  
12 pending the parties' mediation and giving the parties until July 10, 2015 to provide the Court with  
13 a status update (ECF No. 40).

14 In accord with the parties' agreement to mediate this Action, the parties exchanged  
15 informal discovery requests, which led to the production and review of thousands of pages of  
16 documents. The parties also exchanged confidential mediation statements addressing Plaintiffs'  
17 allegations and LifeLock's potential defenses thereto.

18 On July 1, 2015, the parties participated in mediation before the highly respected  
19 mediator, Justice Howard Wiener. While the parties made good progress, they were unable to  
20 reach a mutually agreeable resolution to the Action. However, the parties agreed to schedule a  
21 second mediation session, and accordingly filed a fourth Joint Stipulation Regarding Amended  
22 Complaint (ECF No. 41) requesting a further extension until after the parties' August 18, 2015  
23 mediation, which the Court granted on July 8, 2015 (ECF No. 42).

24 Leading up to the parties' second mediation session, the parties continued to engage in  
25 informal discovery. Ultimately, LifeLock produced, and Plaintiffs' Counsel reviewed, over  
26 10,000 pages of documents, which included, but was not limited to: (i) exemplars of 416 print  
27 advertisements disseminated between April 2010 and December 2012; (ii) exemplars of 75 aired  
28 television commercials; (iii) account histories for the individual Plaintiffs; (iv) the Settlement

1 Agreement in the Multi District Litigation entitled *In Re LifeLock, Inc. Marketing and Sales*  
 2 *Practices Litigation*, MDL Docket No. 08-1977-MHM in the United States District Court for the  
 3 District of Arizona; (v) certain documents filed in the matter entitled *Federal Trade Commission*  
 4 *v. LifeLock, Inc.*, Case No. 10-CV-00530-PHX-MHM (D. Ariz.); (vi) transcripts of depositions  
 5 taken in other litigation involving LifeLock; (vii) an affidavit signed by Stephen Burke, a former  
 6 LifeLock employee; (viii) consumer surveys LifeLock conducted concerning certain of its  
 7 advertisements; (ix) “white papers” that LifeLock provided to the FTC in connection with its 18-  
 8 month investigation; (x) contracts between LifeLock and its vendors; (xi) LifeLock call-center  
 9 scripts; (xii) LifeLock’s terms of service during the alleged Class Period; (xiii) insurance policies  
 10 underlying LifeLock’s \$1 million guarantee; (xiv) information regarding LifeLock subscribers;  
 11 (xv) alert histories including times when alerts may not have been delivered immediately; (xvi)  
 12 product pricing; (xvii) identity theft protection plan cancellations; (xviii) financial institutions  
 13 within LifeLock’s monitoring network; and (xix) LifeLock’s responses to numerous of the FTC’s  
 14 requests for information. The parties also exchanged supplemental mediation briefs.

15 On August 18, 2015, the parties participated in a second, all-day mediation session. At  
 16 the conclusion of this session and only after Justice Wiener made a mediator’s proposal, the  
 17 parties reached an agreement in principle to resolve this Action. The parties memorialized the  
 18 principle terms of their agreement in a non-binding Memorandum of Understanding (“MOU”).

19 Thereafter, the parties engaged in further negotiations regarding the remaining terms of  
 20 the Settlement, and worked together to develop a comprehensive set of settlement papers,  
 21 including the Class Action Settlement Agreement, the proposed Notices, the Claim Form, and the  
 22 proposed orders.

23 As part of the settlement framework and in furtherance of Plaintiffs’ Counsel’s due  
 24 diligence, Plaintiffs’ Counsel took Rule 30(b)(6) depositions on various topics, including  
 25 LifeLock’s policies and practices in delivering alerts to customers and how those policies and  
 26 practices changed over time. LifeLock produced two key employees for these depositions: (1)  
 27 Gregory Lim, Vice President Enterprise Risk & Strategic Operations, who was deposed on  
 28 September 24, 2015; and (2) Sharma Upadhyayula, Sr. Director, Product Management, who was

1     deposed on September 25, 2015.

2             On July 21, 2015, the Federal Trade Commission (“FTC”) filed an enforcement action in  
 3     *Federal Trade Commission v. LifeLock, Inc.*, Case No. CV-10-00530-PHX-JJT, pending in the  
 4     United States District Court for the District of Arizona (“FTC Action”), which involves  
 5     underlying alleged violations that overlap with claims asserted on behalf of the Class in this  
 6     action. After the principle Settlement terms in this Action were memorialized in the MOU,  
 7     LifeLock negotiated a separate proposed agreement with staff of the FTC that, if approved by the  
 8     Commission and the court, would settle the FTC Action by entry of a judgment for \$100,000,000  
 9     in favor of the FTC for the purpose of consumer redress. The proposed settlement would require  
 10    LifeLock to satisfy the \$100,000,000 judgment by depositing the judgment amount in the registry  
 11    of the United States District Court for the District of Arizona. LifeLock would be authorized to  
 12    use up to \$68,000,000 from that Court registry to provide redress to consumers by funding the  
 13    Settlement Fund in this Action, provided that the Settlement Fund complies with the conditions of  
 14    the ultimate order entered by the court overseeing the FTC Action. However, pursuant to  
 15    paragraph 57 of the Agreement in this Action, if for any reason, all or part of the \$68,000,000 has  
 16    not been distributed from the Court’s Registry to the Settlement Administrator by the date of  
 17    entry of the Final Approval Order, then LifeLock must pay within three business days following  
 18    entry of the Final Approval Order sufficient amounts to fully fund the \$68,000,000 Settlement  
 19    Fund.

20             The Settlement was executed by all parties on November 3, 2015. A copy of the executed  
 21    Settlement is being submitted simultaneously herewith as Exhibit A to the Joint Declaration.

### 22    **III.    THE PROPOSED SETTLEMENT AND SCHEDULE OF EVENTS**

#### 23    **A.    Summary of the Settlement Terms**

24             The Settlement requires Defendant to establish a non-reversionary Settlement Fund of  
 25    \$68,000,000 for the benefit of eligible Class Members, which includes a Class and Subclass. The  
 26    Settlement defines the Class and Subclass as follows:

#### 27    Class:

28             All members of a LifeLock identity theft protection plan in the United States at  
               any time between September 1, 2010, and the date of the Preliminary Approval

Order.<sup>3</sup>

Subclass:

All individuals who enrolled in (i.e. became a member of) a LifeLock identify theft protection plan in the United States at any time between January 1, 2012, and April 30, 2015.<sup>4</sup>

LifeLock is excluded from the Class as well as any parent, subsidiary, affiliate, or controlled person of LifeLock, as well as the officers, directors, agents, servants or employees of LifeLock and the immediate family members of any such persons. Also excluded is any judge who may preside over the lawsuit.

All members of the Class were subject to the core allegations of misrepresentations in this action: (1) LifeLock's promise to provide "comprehensive" services in detecting fraud; (2) LifeLock's promise to provide timely and continuous alerts of potential fraud twenty four hours a day, seven days a week, three hundred sixty five days a year; (3) LifeLock's promise to keep customers' sensitive personal data—including credit card, social security, and/or bank account numbers which all Class members were required to and did provide to LifeLock—secure; and (4) LifeLock's promise to provide a "\$1 Million Total Service Guarantee."

The Subclass accounts for differing potential damages allegedly sustained by those Class Members who purchased LifeLock services during the timeframe between January 1, 2012 and April 30, 2015. Specifically, LifeLock's practices during that timeframe were particularly problematic in that LifeLock advertised and marketed that it would provide "continuous, uninterrupted" alerts of potential credit or identity fraud to customers 24 hours a day, seven days a week, 365 days a year. However, during that same timeframe, Plaintiffs claim that LifeLock failed to deliver on that promise for various reasons, including its inability to provide alerts during multiple planned maintenance and unplanned system outages and its decision to not deliver certain alerts during 42 different weekends. Since April 30, 2015, however, LifeLock no longer makes such claims regarding alerts in its advertising, and it has also made multiple technical improvements to its systems to ensure that customers will receive timely alerts. For

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<sup>3</sup> LifeLock estimates there are approximately 6.8 million Class Members.

<sup>4</sup> LifeLock estimates there are approximately 3.4 million Subclass Members.

example, LifeLock is now able to deliver alerts during planned maintenance and unplanned system outages through the use of “parallel tracks” that allow maintenance of the system on one track while alerts continue to be delivered to customers on another track. In addition, LifeLock now has emergency backup systems through which alerts may be processed and delivered.

Pursuant to the terms of the Settlement, LifeLock has agreed to establish a \$68,000,000 non-reversionary Settlement Fund for the benefit of members of the proposed Class. The following proposed method of allocation pursuant to Sections VI and VII of the Settlement (the “Plan of Allocation”) accounts for the fact that LifeLock’s practices were more problematic during the Subclass timeframe:

- A Subclass Fund shall be created based on the percentage of the Class that comprises the Subclass. For instance, if the Subclass comprises 50% of the Class, then 50% of the Settlement Fund shall be allocated to the Subclass Fund.
- Each Settlement Subclass Member will receive an automatic *pro rata* distribution from the Subclass Fund.
- In addition, each Class Member (including those who are members of the Subclass) may submit a claim for Twenty Dollars (\$20.00) from the Class Fund, which shall be the Settlement Fund less the Subclass Fund. In the event that claims submitted by Valid Claimants, *i.e.* Class Members who have submitted a timely and valid claim, exceed the total amount of the Class Fund, each Valid Claimant shall have a right to receive a *pro rata* distribution from the Class Fund.
- In the event that money remains from uncashed checks 120 days after the Payment Dates, a second *pro rata* distribution shall be made to Valid Claimants who cashed their initial payment checks.
- In the event that money remains from uncashed checks 120 days after the second distribution, the money shall be deposited into the Court Registry in the FTC Action described in Section IV(C)(4) below.

While actual payment amounts cannot be calculated at this time, Class Counsel estimate that Settlement payments will be approximately \$20 for Settlement Class Members who make claims, \$16 for Settlement Subclass Members who do not make claims, and \$36 for Settlement Subclass Members who make claims, based on an estimated claims rate of 10% and estimated Class size of 6.8 million and Subclass size of 3.4 million.

The Settlement further provides that Settlement Administrative costs and any award of attorneys' fees and costs and/or Service Awards to the Class Representatives will be paid by LifeLock *in addition to* (and not out of) the Settlement Fund. LifeLock has agreed not to oppose an application by Class Counsel for an award of \$10,200,000 in Attorneys' fees and Expenses, and for Service Awards in the amount of \$2,000 to each of the four Class Representatives.

In exchange of the foregoing consideration, the Final Judgment will be entered upon final approval of the Settlement, and the Settlement Class Members will thereby release all claims which have been or could have been asserted against the Defendant by any member of the Settlement Class.

**B. Proposed Schedule of Events**

Consistent with the provisions of the Settlement, Plaintiffs respectfully propose the following schedule for the various Settlement events:

Date	Event
Three (3) business days after entry of Preliminary Approval Order	Deadline for LifeLock to provide Class Data to Settlement Administrator
Ten (10) days after filing of Preliminary Approval Motion	Deadline for Settlement Administrator to provide notice to federal or state officials per U.S.C. § 1715
Ten (10) days after entry of Preliminary Approval Order (or within three (3) calendar days after entry of Final Approval Order if money not released from Court's Registry in the FTC Action)	LifeLock shall pay the sum to the Settlement Administrator of Sixty-Eight Million Dollars (\$68,000,000.00) to create the Settlement Fund
Thirty (30) days after entry of Preliminary Approval Order	Notice Date and deadline for the Settlement Website and Toll-Free Number to go live
Thirty (30) days after Notice Date	Deadline for Class Counsel to file application for Attorneys' Fees and Expenses and request for Service Awards
Forty-five (45) days after Notice Date	Objection, Opt-Out Deadline
Sixty (60) days after Notice Date	Claim Deadline
Ten (10) days after notification from Settlement Administrator that more than two percent (2%) of the Class has requested exclusion	Deadline for LifeLock to notify Class Counsel and the Court that it is cancelling the settlement
Fifty-five (55) days after Notice Date	Settlement Administrator to provide to Class Counsel and LifeLock's Counsel a final list of Class Members who requested exclusion or objected
Seventy-five (75) days after Notice Date	Settlement Administrator to provide and Class Counsel to file a declaration detailing the scope, method, and status of the Class Notice program and the Claim process.

Date	Event
Seventy-five (75) days after Notice Date	Deadline for Final Approval Motion; and for the parties to provide any responses to Settlement Objections
One business day after entry of the Final Approval Order	Final Settlement Date
Twenty (20) days after the Final Settlement Date, or earlier if agreed upon by parties.	Payment Date (i.e., Deadline for Settlement Administrator to Disburse Settlement Fund)
Thirty (30) days after Payment Date	Settlement Website taken down
Thirty-five (35) days after Payment Date	Settlement Administrator to transfer Settlement Website URL to LifeLock
One hundred and twenty (120) days after Payment Date	Settlement checks expire
One hundred and twenty (120) days after the date appearing on second payment checks	Any checks issued as further distribution expire
One hundred and eighty (180) days after Final Settlement Date	Deadline for Class Counsel to return documents produced by LifeLock
One (1) year plus thirty (30) days after Payment Date	Deadline for Settlement Administrator to return documents received from Class Counsel or LifeLock's Counsel

#### IV. LEGAL ANALYSIS

##### A. Applicable Legal Standards

Federal Rule of Civil Procedure 23 requires judicial approval of the compromise of claims brought on a class basis. The procedure for judicial approval of a proposed class action settlement is well established and is comprised of the following:

- (1) Certification of a settlement class and preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval.
- (2) Dissemination of notice of the proposed settlement to the affected class members.
- (3) A formal fairness hearing, or final settlement approval hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement are presented.

*See* Manual for Complex Litigation, Fourth (Fed. Jud. Center 2004), §§ 21.63 *et seq.* This procedure safeguards class members' procedural due process rights and enables the Court to fulfill its role as guardian of class interests. *See* 4 Newberg on Class Actions, § 11.22 *et seq.* (4th ed. 2002) ("Newberg").

At this juncture and with this motion, Plaintiffs respectfully request that the Court take the first steps in the settlement approval process by granting preliminary approval of the proposed Settlement; provisionally certifying the proposed Class; and directing that notice be disseminated



1 to the Class pursuant to the proposed notice program.

2 **B. Certification of the Proposed Settlement Class is Appropriate**

3 Certification of the proposed Class and Subclass is appropriate because Rule 23(a) and  
4 Rule 23(b)(3) are satisfied.

5 **1. Rule 23(a) is Satisfied.**

6 **a. The Class and Subclass are Too Numerous to Permit Joinder.**

7 A case may be certified as a class action only if “the class is so numerous that joinder of  
8 all members is impracticable.” Fed. R. Civ. P. 23(a)(1). While there is no fixed rule, numerosity  
9 is generally presumed when the potential number of class members reaches forty (40). *Jordan v.*  
10 *County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S.  
11 810 (1982).

12 Here, LifeLock estimates that there are approximately 6.8 million Class Members, 3.4  
13 million of whom are in the Subclass. Accordingly, the Class and Subclass are sufficiently  
14 numerous to satisfy Rule 23(a)(1).

15 **b. This Action Presents Common Questions of Law or Fact.**

16 Rule 23(a)(2) requires that there be one or more questions common to the class. *See*  
17 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); 1 Newberg § 3.10; *see also Wal-*  
18 *Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011). In this Action, questions of law or fact  
19 common to all members of the Class include, among others, the following: (1) whether  
20 LifeLock’s promise of “comprehensive” monitoring services was misleading and/or deceptive;  
21 (2) whether LifeLock’s alert notification services were subject to regular delays and/or shut-  
22 downs; (3) whether LifeLock failed to maintain adequate technology and safeguards to deliver the  
23 protections as promised related to consumers’ sensitive personal data, including credit card, social  
24 security, and/or bank account numbers, which all Class Members provided to LifeLock; and (4)  
25 whether LifeLock misrepresented and/or misled consumers regarding the benefits of its \$1  
26 Million Total Service Guarantee.



c. **Plaintiffs' Claims are Typical of Those of the Class and Subclass.**

Rule 23(a)(3) requires that “the claims and defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Typicality does not require total identity between representative plaintiffs and class members. *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001). Rather, typicality is satisfied so long as the named plaintiffs’ claims stem “from the same event, practice, or course of conduct that forms the basis of the class claims, and is based upon the same legal theory.” *Jordan*, 669 F.2d at 1322; *In re Juniper Networks Sec. Litig.*, 264 F.R.D. 584, 589 (N.D. Cal. 2009) (“representative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members”) (citation omitted).

Here, the named Plaintiffs’ claims stem from the same common course of conduct as the claims of the Class Members. Plaintiffs and all Class Members purchased LifeLock’s products and/or services that were advertised, marketed, and sold as providing “comprehensive” monitoring services, timely and continuous alert detection and notification services, and a \$1 Million Total Service Guarantee. Plaintiffs and all Class Members provided Lifelock with sensitive personal data such as credit card, social security, and bank account numbers. Additionally, because Plaintiff Reiner Jerome Ebarle purchased LifeLock’s service between January 1, 2012 and April 30, 2015 when LifeLock was advertising and selling its products and/or services as providing “continuous, uninterrupted” alerts of potential credit or identity fraud to customers 24 hours a day, seven days a week, 365 days a year and was failing to deliver upon that promise, his claims are typical of the Subclass. Thus, the named Plaintiffs’ claims are typical of the Class Members because they arise from LifeLock’s common practices and misrepresentations. Plaintiffs and the Class also share a common injury as a result of LifeLock’s misconduct. As such, Rule 23(a)(3) is satisfied.

d. **Plaintiffs and Their Counsel Will Fairly and Adequately Protect the Interests of the Class Members.**

Rule 23(a)(4) requires that the representative plaintiffs will “fairly and adequately” protect the interests of the class. The two-prong test for determining adequacy is: “(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class

members?; and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *Hanlon*, 150 F.3d at 1020. Both prongs are satisfied here.

First, the named Plaintiffs’ interests are aligned with, and not antagonistic to, the interests of the Class Members. Indeed, the named Plaintiffs and the Class Members are equally interested in demonstrating LifeLock failed to deliver products and/or services as advertised, marketed, and sold, and are further committed to obtaining appropriate redress. *See Hanlon*, 150 F.3d at 1021 (adequacy satisfied where “each...plaintiff has the same problem”). Moreover, to assure adequate representation of those members of the Class, such as Plaintiff Reiner Jerome Ebarle, who purchased LifeLock’s products and/or services during the timeframe of January 1, 2012 to April 30, 2015, when LifeLock’s advertising and practices relating to the delivery of alerts were particularly problematic, the Subclass was constructed.<sup>5</sup> Accordingly, the named Plaintiffs will fairly and adequately protect the interests of all Class Members.

Second, Class Counsel have extensive experience litigating and settling class actions, including consumer cases throughout the United States. *See* Joint Decl., ¶ 28, Exs. B & C. Undoubtedly, Class Counsel is well qualified to represent the Class. Moreover, Class Counsel, along with Plaintiffs, will vigorously protect the interests of the Class and maximize the recovery for all Class Members, as evidenced by, *inter alia*, the terms of the proposed Settlement.

## **2. The Requirements of Rule 23(b)(3) are Satisfied.**

In addition to the requirements of Rule 23(a), at least one of the prongs of Rule 23(b) must be satisfied. Here, the proposed Class and Subclass satisfy Rule 23(b)(3), which permits a class action if the Court finds that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other

<sup>5</sup> As previously set forth in Section II above, the Subclass was created to account for the difference in potential damages sustained by those individuals who purchased LifeLock’s services based on differences that existed in the delivery of LifeLock’s services and its advertising and practices during the timeframe between January 1, 2012 and April 30, 2015. During this timeframe, LifeLock advertised that it would provide “continuous, uninterrupted” alerts of potential credit or identity fraud to customers 24 hours a day, seven days a week, 365 days a year, but Plaintiffs believe that LifeLock failed to deliver on that promise for various reasons, including its inability to provide alerts during multiple planned and unplanned maintenances and its failure to deliver certain alerts during 42 different weekends.

1 available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P.  
2 23(b)(3).

3 **a. Common Questions of Law or Fact Predominate**

4 In analyzing the predominance factor, the Supreme Court has defined this inquiry as as  
5 establishing “whether proposed classes are sufficiently cohesive to warrant adjudication by  
6 representation.” *Amchem Prods. v. Windsor*, 521 U.S. 591, 622 (1997). The predominance  
7 inquiry examines “whether the shared attributes will be the main focus of the litigation.”  
8 *Barragan v. Evanger’s Dog & Cat Food Co.*, 259 F.R.D. 330, 334 (N.D. Ill. 2009) (citing  
9 *Amchem*, 521 U.S. at 623-24). Importantly, “[w]hen a proposed class challenges a uniform  
10 policy, the validity of that policy tends to be the predominant issue in the litigation.” *Nicholson v.*  
11 *UTI Worldwide, Inc.*, No. 3:09-cv-722-JPG-DGW, 2011 U.S. Dist. LEXIS 49890, at \*19 (S.D.  
12 Ill. 10, 2011) (internal quotation marks and citations omitted) (finding defendant’s policy of not  
13 paying overtime predominated). “Although the extent of each class member’s personal damages  
14 might vary,” this does not defeat commonality if there are substantial common issues that  
15 outweigh the single variable of damage amounts. *Arreola v. Godinez*, 546 F.3d 788, 801 (7th Cir.  
16 2008).

17 The common issues in this Action vastly outweigh any individual issues. The common  
18 issues, as set forth above in Section IV(B)(1)(b), arise from a common course of conduct, and  
19 there is likely to be common evidence whether Defendant’s actions violated applicable law.  
20 Accordingly, this prong of Rule 23(b) is satisfied.

21 **b. A Class Action is the Superior Method of Adjudicating this**  
22 **Action**

23 The second prong of Rule 23(b) is satisfied by the proposed Settlement. As explained in  
24 *Amchem*, “[c]onfronted with a request for settlement-only class certification, a district court need  
25 not inquire whether the case, if tried, would present intractable management problems, *see* Fed.  
26 Rule Civ. Pro. 23(b)(3)(D), for the proposal is that there be no trial.” *Amchem*, 521 U.S. at 620.  
27 Thus, any manageability problems that may have existed in this case are eliminated by the  
28 proposed Settlement.

1           **C.     Preliminary Approval of the Settlement is Appropriate.**

2           Public policy “strong[ly] . . . favors settlements, particularly where complex class action  
3 litigation is concerned.” *Pilkington v. Cardinal Health, Inc.*, 516 F.3d 1095, 1101 (9th Cir.  
4 2008); *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs*  
5 *v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

6           “[T]he decision to approve or reject a settlement is committed to the sound discretion of  
7 the trial judge because he is exposed to the litigants and their strategies, positions, and proof.”  
8 *Hanlon*, 150 F.3d at 1026. In exercising such discretion, the Court should give “proper deference  
9 to the private consensual decision of the parties...[T]he court’s intrusion upon what is otherwise a  
10 private consensual agreement negotiated between the parties to a lawsuit must be limited to the  
11 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or  
12 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a  
13 whole, is fair, reasonable and adequate to all concerned.” *Hanlon*, 150 F.3d at 1027; *see also*  
14 *Fed. R. Civ. P. 23(e)(2)*.

15           Importantly, “[b]ecause class members will subsequently receive notice and have an  
16 opportunity to be heard on the settlement, [a] Court need not review the settlement in detail at  
17 [the preliminary approval stage]; instead, preliminary approval is appropriate so long as the  
18 proposed settlement falls ‘within the range of possible judicial approval.’” *In re M.L. Stern*  
19 *Overtime Litig.*, No. 07-CV-0118-BTM (JMA), 2009 U.S. Dist. LEXIS 31650, at \*9-10 (S.D.  
20 Cal. April 13, 2009) (quoting A. Conte & H. B. Newberg, *Newberg on Class Actions*, § 11.25  
21 (4th ed. 2002)).

22           The proposed Settlement here satisfies the standard for preliminary approval because:  
23 (a) it is within the range of possible approval; (b) there is no reason to doubt its fairness because it  
24 is the product of hard-fought, arms-length negotiations between the parties and was only reached  
25 after a thorough investigation by Plaintiffs’ Counsel of the facts and the law and after a  
26 mediator’s proposal was made at the conclusion of two days of mediation; and (c) Plaintiffs and  
27 Class Counsel believe it is in the best interest of the Class.

1                               **1.     The Settlement Falls Within the Range of Possible Approval**

2             Determining whether a settlement is “reasonable” is not susceptible to a mathematical  
 3 equation yielding a particularized sum. *In re Med. Ex-Ray Film Antitrust Litig.*, No. CV-93-5904,  
 4 1998 U.S. Dist. LEXIS 14888, at \*15 (E.D.N.Y. Aug. 7, 1998); *Newman v. Stein*, 464 F.2d 689,  
 5 693 (2d Cir. 1972) (“[I]n any case there is a range of reasonableness with respect to a settlement –  
 6 a range which recognizes the uncertainties of law and fact in any particular case and the  
 7 concomitant risks and costs necessarily inherent in taking any litigation to completion.”). As  
 8 such,

9                     [t]he fact that a proposed settlement may only amount to a fraction of the potential  
 10 recovery does not, in and of itself, mean that the proposed settlement is grossly  
 11 inadequate and should be disapproved. . . . In fact there is no reason, at least in  
 theory, why a satisfactory settlement could not amount to a hundredth or even a  
 thousandth part of a single percent of the potential recovery.

12 *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 & n.2 (2d Cir. 1974) (citations omitted).

13             Here, the Settlement provides for a cash Settlement Fund of \$68,000,000, all of which will  
 14 be distributed to the Class. While Plaintiffs have calculated the maximum value of their claims to  
 15 be a figure larger than the settlement amount, when this amount is discounted by the identifiable  
 16 risks, experience dictates that the interests of the Class are better served by the proposed  
 17 Settlement. *See In re LinkedIn User Privacy Litig.*, No. 5:12-cv-03088-EJD, 2015 U.S. Dist.  
 18 LEXIS 123130, at \*22 (N.D. Cal. Sept. 15, 2015) (“Immediate receipt of money through  
 19 settlement, even if lower than what could potentially be achieved through ultimate success on the  
 20 merits, has value to a class, especially when compared to risky and costly continued litigation.”);  
 21 *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff’d*, 440 F.2d  
 22 1079 (2d Cir. 1971) (“In considering the proposed compromise, it seems also to be of importance  
 23 that (if approved) the substantial amounts of money are available for class members now, and not  
 24 at some distant time in the future.”) (citations omitted); *see also In re Michael Milken & Assocs.*  
 25 *Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993) (noting that even a favorable jury verdict “is no  
 26 guarantee of ultimate success”).

27             Indeed, in contrast to the tangible, immediate benefits of the Settlement, the outcome of  
 28 continued litigation and a trial against LifeLock is uncertain and could add years to this litigation.

1 LifeLock has vigorously denied Plaintiffs' allegations of wrongdoing, and, absent settlement,  
2 Plaintiffs anticipate LifeLock would defend this action aggressively at multiple, procedural steps  
3 prior to trial, including a motion to dismiss, motion for summary judgment and opposition to  
4 class certification. In particular, LifeLock denies that it engaged in any intentional "throttling"  
5 (*i.e.* systemic delays) of alerts, and also maintains that it provides the most comprehensive  
6 identity theft protection services available on the market. LifeLock additionally asserts that any  
7 inadvertent delays in sending alerts to customers affected only a small number of its customers,  
8 and that such delays in any event did not result in any harm in the form of actual credit fraud or  
9 identity theft such that LifeLock claims that none of the Class Members have suffered any injury.  
10 Moreover, LifeLock believes that variances in the representations that Class Members saw,  
11 whether Class Members' alerts were delayed, and whether Class Members suffered any harm  
12 make class certification unlikely. While Plaintiffs disagree with LifeLock's view, there is at least  
13 some risk that, absent a settlement, Class Members might recover nothing. In reaching the  
14 Settlement prior to dispositive motions or trial, Plaintiffs and Class Counsel have ensured a  
15 favorable recovery for the members of the Class and avoided significant expense, delay, and  
16 uncertain results.

17 Moreover, the proposed Plan of Allocation is fair and reasonable as it is tied to the  
18 strength of the Class and Subclass Members' respective claims and accounts for differences in  
19 their purchasing decisions based upon differences in LifeLock's advertising and practices and the  
20 delivery of LifeLock's services. At enrollment, Subclass Members were promised that alerts of  
21 potential credit or identity fraud would be provided to them 24 hours a day, seven days a week,  
22 365 days a year, but Plaintiffs claim LifeLock failed to deliver on its promise during planned and  
23 unplanned system outages and on certain weekends. Hence, Subclass Members will receive  
24 automatic, *pro rata* distributions from the Subclass Fund, while all Class Members (including  
25 those who are members of the Subclass) may submit a claim form online or via mail for a  
26 payment from the Class Fund.

27 In sum, the Settlement provides substantial relief to all Class Members based on the  
28 strengths of their respective claims without delay and is within the range of reasonableness,

1 particularly in light of the above risks that Class Members would face in litigation.

2           **2. The Settlement is the Product of Arms-Length Negotiations After a**  
 3           **Thorough Investigation, Without a Trace of Collusion**

4           “Before approving a class action settlement, the district court must reach a reasoned  
 5 judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion  
 6 among, the negotiating parties.” *City of Seattle*, 955 F.2d at 1290. Where a settlement is the  
 7 product of arms-length negotiations conducted by capable and experienced counsel, the court  
 8 begins its analysis with a presumption that the settlement is fair and reasonable. *See* 4 Newberg  
 9 § 11.41; *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at \*32  
 10 (C.D. Cal. June 10, 2005); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980).

11           Here, the Settlement was reached after informed, extensive arm’s-length negotiations.  
 12 First, the Settlement was reached after a thorough investigation into and discovery of the legal  
 13 and factual issues in the Action. In particular, before filing suit, Class Counsel conducted an  
 14 extensive investigation into LifeLock’s marketing and advertising materials, its terms of service,  
 15 and its Master Insurance Policy, as well as industry facts and the applicable law. In addition to  
 16 their pre-filing efforts, Class Counsel engaged in an ongoing factual and legal investigation  
 17 throughout the pendency of this Action. As part of their continued investigation, Class Counsel  
 18 reviewed and analyzed thousands of documents informally produced by LifeLock relating to the  
 19 key issues in this Action, including, among other things, LifeLock’s advertising, its policies and  
 20 practices in sending alerts, any issues that resulted in delays in sending alerts, and the scope of its  
 21 identity and credit fraud monitoring network. *See* Section II, *supra*. Class Counsel also deposed  
 22 two central employees who were designated as LifeLock’s representatives on certain topics,  
 23 including its advertising, policies and practices in delivering alerts, issues that caused any delays  
 24 in alerts, and the improvements LifeLock has made to its advertisements and its alert processing  
 25 and delivery systems, which were completed by April 30, 2015. *Id.*

26           Second, the Settlement was only reached after the parties participated in two full-day  
 27 mediation sessions before experienced mediator Justice Howard Wiener. Wiener Decl. ¶ 11.  
 28 These mediation sessions were informed through the exchange of confidential mediation



statements, which discussed the strengths and weaknesses of both Plaintiffs' allegations and LifeLock's potential defenses and relevant documents related thereto. Throughout the mediation sessions, each party's respective counsel vigorously advocated for their respective client's position. *Id.* ¶ 10. Notwithstanding the contentious nature of the mediation sessions, the parties were able to come to an agreement in principle with the assistance of Justice Wiener, and only after a mediator's proposal. *Id.* ¶ 9.

In sum, it is clear that the Settlement was reached only after Class Counsel conducted an extensive factual investigation and discovery into the Defendant's alleged misconduct and potential damages, thoroughly researched the law pertinent to Plaintiffs' and the Class' claims and the Defendant's defenses. Consequently, Class Counsel had a wealth of information at their disposal before entering into settlement negotiations, which allowed Class Counsel to adequately assess the strengths and weaknesses of Plaintiffs' case and balance the benefits of settlement against the risks of further litigation. Nothing in the course of the negotiations or in the substance of the proposed Settlement presents any reason to doubt the Settlement's fairness.

### 3. The Recommendation of Experienced Counsel Favors Approval.

In considering a proposed class settlement, "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 U.S. Dist. LEXIS 11149, at \*11 (N.D. Cal. Feb. 2, 2009); *see also Linney v. Cellular Alaska Partnership*, No. C-96-3008 DLJ, 1997 WL 450064, at 5 (N.D. Cal. July 18, 1997). Here, Class Counsel endorse the Settlement as fair, adequate, and reasonable. Joint Decl., ¶ 4.

As demonstrated herein and in each respective firms' resume, Class Counsel have extensive experience litigating and settling consumer class actions and other complex matters (*see id.*, ¶ 28, Exs. B & C) and have conducted an extensive investigation into the factual and legal issues raised in this Action (*see id.*, ¶ 29). Using their experience and knowledge, Class Counsel have weighed the benefits of the Settlement against the inherent risks and expense of continued litigation, and they strongly believe that the proposed Settlement is fair, reasonable, and adequate. The fact that qualified and well-informed counsel endorse the Settlement as being fair,



reasonable, and adequate weighs heavily in favor of approving the Settlement.

**4. The Related FTC Action Further Supports Preliminary Approval**

Under the proposed settlement of the FTC Action, if approved by the Commission and the court, LifeLock would be authorized to use up to \$68,000,000 of the funds that it deposits in the Court's registry to fund the Settlement Fund in this Action, provided that the Settlement Fund complies with the conditions of the ultimate order entered by the court overseeing the FTC Action. This coordination lends further support to preliminary approval. *See In re TracFone Unlimited Service Plan Litig.*, No. C-13-3440 EMC, 2015 WL 4051882 at \*1 (N.D. Cal. July 2, 2015) (holding that coordination of a consumer settlement with an FTC settlement "weigh[ed] in favor of final approval"); *Churchill Village*, 361 F.3d at 575 (coordination with the government should be considered when determining whether a settlement should be finally approved).

**D. The Proposed Forms of Notice and Notice Program are Appropriate and Should be Approved.**

The proposed forms of notice and notice program fully comply with due process and Fed. R. Civ. P. 23. Rule 23 (c)(2)(B) requires:

the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through an attorney if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on class members under Rule 23(c)(3).

In the context of a class settlement, the notice must also include a general description of the proposed settlement. *See Churchill Village*, 361 F.3d at 575; *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

Here, the Settlement requires Plaintiffs to provide direct, individual notice of the Settlement to Class Members via email or mail, utilizing Defendant's internal records. In addition to direct notice, notice of the Settlement will be posted on the Settlement Administrator's website and published in an one-eighth (1/8) page advertisement in USA Today. These notices shall, among other things, advise Class Members of the pendency of the Action, including the nature of the action and a summary of the claims; the essential terms of the Settlement; the rights

1 of Class Members to share in the recovery or to request exclusion from the Class; the rights of  
 2 Class Members to object to the Settlement and to appear before the Court at the Final Approval  
 3 Hearing, and will provide specifics on the date, time, and place of the Final Approval Hearing.  
 4 The notices also contain information regarding Class Counsel's fee and expense application,  
 5 Class Representatives' service awards, and the proposed Plan of Allocation. Thus, the notices  
 6 provide the necessary information for Class Members to make an informed decision regarding the  
 7 proposed Settlement.

8 In short, the form and manner of notice proposed here fulfill all of the requirements of  
 9 Rule 23 and due process, and Plaintiffs request that the Court direct that notice of the proposed  
 10 Settlement be given to the Class.

### 11 **CONCLUSION**

12 For the foregoing reasons, Plaintiffs respectfully request that the Court do the following:

- 13 a) Grant Plaintiffs leave to file their Second Amended Class Action Complaint;
- 14 b) Grant preliminary approval of the proposed Settlement entered into between the  
 15 parties;
- 16 c) Certify, for settlement purposes, the proposed Class and Subclass, as defined in the  
 17 Settlement;
- 18 d) Appoint Plaintiffs Napoleon Ebarle, Jeanne Stamm, Brian Litton, and Reiner  
 19 Jerome Ebarle as Class Representatives;
- 20 e) Appoint Hank Bates of Carney Bates & Pulliam PLLC and Michael W. Sobol of  
 21 Lieff Cabraser Heimann & Bernstein LLP as Class Counsel;
- 22 f) Approve the parties' proposed notice program, including the proposed forms of  
 23 notice, as set forth in the Settlement, and direct that notice be disseminated  
 24 pursuant to such program;
- 25 g) Appoint Garden City Group as Settlement Administrator, and direct Garden City  
 26 Group to carry out the duties and responsibilities of the Settlement Administrator  
 27 specified in the Settlement;
- 28 h) Stay all non-Settlement related proceedings in the Action pending final approval of  
 the Settlement; and
- i) Set a Fairness Hearing and certain other dates in connection with the final  
 approval of the Settlement.

1 Dated: November 4, 2015

Respectfully submitted,

2 By: /s/ Michael W. Sobol

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